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No. 726

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

J. B. ACTON, INC., *Appellant*

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri, Western Division, is reported at 221 Fed. Supp. 174. The decision of the Interstate Commerce Commission appears at 89 MCC 59. Appended hereto marked Appendix A and Appendix B to this Jurisdictional Statement are copies of each of those opinions.

JURISDICTION

This action was originally brought under the provisions of Secs. 204 (c) and 212 (a) of the Interstate Commerce Act, 49 USCA 304 (c) and 312 (A), Sec. 10 of the Administrative Procedures Act, 5 USCA 1009 and Secs. 1336, 1338, 2284, and 2321 to 2325, inclusive, of the Judicial Code, 28 USCA 1336, 1398, 2284 and 2321 to 2325, inclusive, with the United States being named as a party defendant pursuant to 28 USCA 2322.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred upon this Court by Secs. 1253 and 2101 (b) of the Judicial Code, 28 USCA 1253 and 2101 (b). The original action was brought for the purpose of setting aside the appended order of the Interstate Commerce Commission. The judgment of the District Court on the action below was entered therein on September 9, 1963, and a timely notice of appeal from that decision was filed, October 29, 1963.

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case:

> *ICC* v. *J-T Transport Company*, 368 U.S. 81; *United States* v. *Drum*, 368 U.S. 370; and *American Trucking Associations, Inc., et al*, v. *U.S., et al.*, 364 U.S. 1.

STATUTES INVOLVED

Primarily involved are two sections of the Administrative Procedure Act, specifically 5 USCA, Sec. 1009 (e), which provides:

> "*Scope of review*—So far as necessary to decision and where presented the reviewing court shall de-

cide all relevant questions of law, interpet constitutional and statutory provisions and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Secs. 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reveiewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

and 5 USCA, Sec. 1007 (b) which in part provides:

"All decisions (including initial, recommended, or tenative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

QUESTIONS PRESENTED

1. Did the ICC and the Court below err in concluding that a certificate of public convenience and necessity issued to appellant and providing for its transportation of

"Oil-field equipment, machinery, and materials."

prohibited the handling of "machinery" and "materials" other than "oil-field machinery" and "oil-field materials"?

2. Did the Court below err in concluding that the commodity description

"oil-field equipment, machinery, and materials,"

was "patently ambiguous."?

STATEMENT OF THE CASE

The appellant, J. B. Acton, Inc., is a common carrier, by motor vehicle, in interstate or foreign commerce, operating as such under "grandfather clause rights" held by appellant and its predecessors since the inception of the Motor Carrier Act.[1] Particularly, appellant in No. MC 80847, Sub. 2, was granted a certificate of public convenience and necessity containing the following commodity description: "Oil-field equipment, machinery, and materials." This authority was granted in a corrected certificate which bears a *nunc pro tunc* date of March 9, 1956, and corrects an original certificate which bore the same date. These operating rights arose out of Docket MC-4884 in which, on January 18, 1941, in a "grandfather" application, the Commission issued the original certificate involving the operating rights in question to one S. R. Hazelrigg in which the commodity description was identical with that issued to appellant on March 9, 1956. These rights were transferred pursuant to a transfer application approved by the Commission in Docket MC-80847, Sub. 2, on April 24, 1950. However, when the operating rights formerly held by J. B. Acton, as an individual, were

[1] Interstate Commerce Act, 49 U.S.C. Sec. 306.

subsequently transferred to J. B. Acton, Inc., in Docket MC-FC-58586, the original certificate issued to J. B. Acton, Inc., appellant herein, on March 9, 1956, the commodity description read as follows:

"Oil-field equipment, machinery, and materials."

On an objection having been made to this unauthorized change (unbroken underlining), the Commission reissued the *nunc pro tunc* corrected certificate under the original date of March 9, 1956, in the form which it now stands, which is "oil-field equipment, machinery, and materials."

Pursuant to the operating rights therein granted, the appellant herein, J. B. Acton, Inc., filed with the Commission, as its rules require, a tariff covering the commodities for which it conceived that it had operating authority, including those which fit and would be included in the general description of machinery and materials and those which fit the description of oil field equipment.

As disclosed by the decisions (Appendices A and B), appellant has continuously hauled a variety of machinery and materials, including tractors, heat exchangers, castings, used laundry machinery, jet engines, structural steel channels, steel rails, water fuel tanks, nuts and bolts, iron and steel girders, priming and coating machines, and a variety of other shipments which were encompassed by the description of machinery and materials and not otherwise related to oil field operations.

The proof adduced before the Examiner, which was the basis for the ruling below in the District Court, demonstrated that before acquiring rights which it

presently has, appellant sought and received expert advice and counsel in respect to the transportation which could lawfully be performed under the certificate to be acquired and reviewed the history of transportation which had thereunder been performed. The proof also developed that approximately 60% of appellant's revenue results from transportation of machinery and materials that can in nowise be characterized as "oil field machinery" or "oil field materials", but does constitute the transportation of machinery and of materials, such as authorized by a certificate, within the ordinary understanding and construction of the English language.

As disclosed by Appendix B, the Commission concluded that the right to transport

> "Oil-field equipment, machinery, and materials."

as prescribed by the certificate meant that appellant was only entitled to engage in the transportation of:

> "(1) oilfield equipment, (2) of oilfield machinery, and (3) of oilfield materials; and that this operating authority is limited to such equipment, machinery, and materials, as are commonly limited in their use to the oilfield industry or are clearly identifiable as being intended for use by the oilfield industry."

In reaching this conclusion, the Commission found:

> "We conclude that respondent's certificate is unambiguous, and that the adjective "oil-field" modifies "materials" and "machinery" as well as equipment."

The Court, in its opinion, Appendix A, while finding that there existed a rational basis for the Commission

decision, found the commodity descripion to be "patently ambiguous", saying

> "Since as written the language in question is patently ambiguous and susceptible of varying constructions, this Court should not substitute another construction for that of the Commission."

From that finding, they further concluded:

> "Further there has been no showing by the plaintiff that the original "grandfather" permit at the time of issuance was interpreted by the holder thereof to allow hauling of anything other than oil-field equipment, oil-field machinery and oil-field materials. There was no showing of any hisory of transportation of machinery and materials other than oil-field equipment, oil-field machinery and oil-field materials under the "grandfather" permit. If the history had clearly demonstrated that the "grandfather" permit covered machinery and materials generally, the decision might be different; however no such history appears in the record.
>
> "The primary responsibility for interpreting certificates and determining what items fall within a commodity description contained therein rests with the Commission. The Commission has exercised that responsibility, delineated the scope of Acton's operating authority, found that Acton had been and was willfully transporting commodities not authorized by its certificate, and issued its order to cease and desist."

Both the Commission and the Court indicate by their opinions that they were materially influenced by their consideration of a definition of the word "materials", where in fact that questions is in no way involved. The issue in question is whether the certificate authorizes the transportation of "machinery" and "mater-

ials", or simply "oil-field machinery" and "oil-field materials".

THE QUESTIONS ARE SUBSTANTIAL

In our notice of appeal we stated that two questions would be presented by this appeal.

The first poses a simple question which directly attacks the rationale of the Commission's decision as indicated by its ultimate conclusion that the authority to transport

> "Oil-field equipment, machinery, and materials."

is the equivalent of an authority to transport

> "(1) oilfield equipment, (2) of oilfield machinery, and (3) of oilfield materials; and that this operating authority is limited to such equipment, machinery, and materials, as are commonly limited in their use to the oilfield industry or are clearly identifiable as being intended for use by the oilfield industry."

If such is so, there must be some real basis for such a drastic conclusion. The principal reason advanced is "industry usage", but we insist that the evidence of record does not show this to be a fact. Another basis advanced is the specious argument that by dictionary definition the word "materials" is the equivalent to "general commodities" which is a term used in certificates authorizing the transportation of that class of commodities. As we point out elsewhere, the question of the definition of that word is not at issue in this proceeding.

The certificated commodity description is clear, concise, and unambiguous, and one which has been in ex-

istence for many years without the Commission heretofore determining that it must be revised and rewritten. The term, consisting of one adjective, three nouns, and a conjunction, is a simple expression which the learned experts, whose testimony was in no way contradicted, found easy to define.

The second question is one raised by the conclusion of the Court to the effect that the involved commodity description is "ambiguous and susceptible of varying constructions", the Court saying:

> "Since as written the language in question is patently ambiguous and susceptible of varying constructions, this Court should not substitute another construction for that of the Commission."

This finding of the Court is its only basis for its conclusion that the construction advanced by the Commission should be accepted. But, as heretofore indicated, the Commission reached on this point an exactly opposite conclusion, saying:

> "We conclude that respondent's certificate is unambiguous and that the adjective "oil-field" modifies "materials" and "machinery" as well as equipment."

This question would become important only in view of the principal heretofore announced to the effect that where the commodity description is "patently ambiguous", the Commission would look into the underlying proceedings to ascertain what authority it had *intended* to authorize.

The conclusion of the Court is clearly erroneous where it would require Acton to carry the burden of proving its antecedent right to the certificate as issued.

The Commission cases all hold that the burden of proof in this type of case would be on the moving party, the Bureau of Inquiry. The materiality of this error is clearly apparent in the final conclusion of the Court, where it said:

> "If the history had demonstrated that the "grandfather" permit covered machinery and materials generally, the decision might be different; however, no such history appears in the record."

We state, in all sincerity, that this record provides no factual basis for the interpretive conclusions reached by the Commission, in fact the evidence of record would compel opposite conclusions to be reached.

Of course, no legal authority is cited to support a conclusion that something means something other than what something means! The Commission overlooked its only known authority for such a position when it neglected to cite the case of *Humpty-Dumpty*. In that case, as reported by Lewis Carroll in "Through The Looking Glass", Humpty-Dumpty is said to have said:

> "When I use a word", Humpty-Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

Alice retorted:

> "The question is", said Alice, "whether you can make words mean so many different things."

Then, Humpty-Dumpty, like our Commission, concluded:

> "The question is", said Humpty-Dumpty, "which is to be master—that's all".

Unless the involved decisions are reviewed by this Court, Acton must necessarily terminate its long conducted motor carrier operations inasmuch as more than sixty percent of its revenues are derived from the handling of commodities which have no connection whatever with the oilfield industry. This administrative high-handed handling of a valuable property right must be corrected, or issued certificates of public convenience and necessity will have no value and will simply exist without hope of continuity and subject to the whim of a future Commission.

CONCLUSION

The questions presented by this appeal are substantial and of such public importance as to require plenary consideration with briefs and oral argument, for their resolution.

Respectfully submitted,

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Certificate of Service

I, James W. Wrape, one of the attorneys for appellant, J. B. Acton, Inc., and a member of the bar of the Supreme Court of The United States, hereby certify that on the ... day of January, 1964, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of The United States on the several parties as follows:

1. On the United States by mailing copy, duly addressed and postage prepaid to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D.C.; Mr. Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.; Mr. John H. B. Wigger, Attorney, Department of Justice, Washington 25, D. C.; Mr. S. Russell Millin, United States Attorney, 549 United States Court House, Kansas City 6, Missouri.

2. On the Interstate Commerce Commission, by mailing copy duly addressed and postage prepaid, to Mr. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.; and to Mr. James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. Upon the intervenors herein by mailing copy, duly addressed and postage prepaid to Mr. Tom B. Kretsinger, Kretsinger and Kretsinger, Attorneys at Law, 510 Professional Building, Kansas City 6, Missouri.

JAMES W. WRAPE
Attorney for Appellant herein

APPENDIX A

Order

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 13879-4

J. B. Acton, Inc., *Plaintiff*,

v.

United States of America and The Interstate Commerce Commission, *Defendants*,

J. L. Cox & Son, Inc., Parkhill Truck Company, J. O. (Red) Willett Pipe Line Stringing Corporation, Dunn Bros., Inc., Middlewest Freightways, Inc., The Chief Freight Lines Company, *Intervening Defendants*.

FINAL JUDGMENT ADOPTING OPINION CONTAINING FINDINGS OF FACTS AND CONCLUSIONS OF LAW, VACATING AND DISSOLVING TEMPORARY RESTRAINING ORDER, AFFIRMING REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION AND DENYING APPLICATION OF PLAINTIFF FOR INTERLOCUTORY AND PERMANENT INJUNCTION

This cause having been submitted upon the record made before this Court, including the record and report of the Interstate Commerce Commission, the briefs and arguments of counsel, and the Court being fully advised in the premises, it is, by the Court, hereby

Ordered and Adjudged that the attached opinion of Becker, District Judge, be, and it is hereby, adopted as the opinion of the Court. It is further

ORDERED AND ADJUDGED that the temporary restraining order hereinbefore issued be, and it is hereby, vacated and dissolved. It is further

ORDERED AND ADJUDGED that the Report and Order of the Interstate Commerce Commission under review be, and it is hereby, in all respects affirmed. It is further

ORDERED AND ADJUDGED that plaintiff's applications for interlocutory and permanent injunctions be, and the same are hereby, denied.

ALBERT A. RIDGE
Albert A. Ridge, *Circuit Judge*

FLOYD R. GIBSON
Floyd R. Gibson, *District Judge*

WILLIAM H. BECKER
William H. Becker, *District Judge*

Kansas City, Missouri
September 5, 1963

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Captioned omitted)

Before RIDGE, Circuit Judge, and GIBSON and BECKER, District Judges.

Memorandum Opinion

BECKER, District Judge:

This is a proceeding brought by J. B. Acton, Inc. (hereinafter referred to as Acton) under Title 28 U.S.C.A., sections 1336, 2284 and 2321 to 2325, to restrain, annul, enjoin and set aside an order of the Interstate Commerce Commission (hereinafter referred to as the Commission)

dated April 3, 1962, entered in Docket No. MC-C-2985, *J. B. Acton Inc., Investigation and Revocation*, 89 M.C.C. 59.

This case came on for final hearing before a duly designated three-judge District Court. The Court has jurisdiction to decide the case. Title 28 U.S.C.A., sections 1336, 2284 and 2325. The complete record before the Commission was introduced into evidence. The cause was orally argued by counsel, written briefs were filed and the case was submitted.

Acton holds corrected certificate of convenience and necessity MC-80847 (Sub-No. 2), authorizing it to transport over irregular routes "*Oil-field equipment, machinery, and materials*" between points in Kansas, Oklahoma, Texas, New Mexico, Arkansas and Louisiana.

The corrected certificate and the rights thereunder stem from Docket No. MC-4884 assigned to "grandfather" operations under the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act) by S. R. Hazelrigg. These rights were subsequently transferred to J. B. Acton individually by Division 4 of the Commission pursuant to proceedings in Docket No. MC-F-4394, January 31, 1956. Docket No. MC-80847 (Sub-No. 2) was assigned to cover the rights acquired by J. B. Acton individually. Pursuant to an order in Docket No. MC-FC-58586, December 27, 1955, the operating rights were transferred to Acton the plaintiff herein.

On April 19, 1960, the Commission, Division 1, on its own motion and pursuant to Section 204(c) and 212(a) of the Interstate Commerce Act (hereinafter referred to as the Act), 49 U.S.C.A., Sections 304(c) and 312(a), instituted an investigation to determine whether Acton ". . . is and has been transporting various commodities not authorized by . . . [its certificate] . . . in violation of Section 206(a) of said Act . . . ," with a view to the entry, if unauthorized operations were found to have oc-

curred and were found to be willful, of an appropriate order suspending for a stated period in whole or in part, the corrected certificate issued to Acton.

A hearing was held before a hearing examiner on March 13, 1961. The parties appeared and introduced evidence. The hearing examiner filed a report finding that Acton was and has been operating in excess of and beyond the terms of its certificate in violation of Section 206(a) of the Act; that the conduct of said unlawful operations appeared to have been, and to be, willful, but yet not such as to warrant or require suspension or revocation of Acton's certificate. The examiner recommended an order requiring Acton to cease and desist from the operations found to be unlawful. Exceptions to the order recommended by the examiner were filed by Acton and by the Bureau of Inquiry and Compliance, Interstate Commerce Commission. The report of the Commission, Division 1, entered April 3, 1962, was as follows:

> "We find that the certificate heretofore granted to respondent in No. MC-80847 (Sub-No. 2), for the transportation of 'oil-field equipment, machinery, and materials,' authorizes the transportation (1) of oil-field equipment, (2) of oil-field machinery, and (3) or oil-field materials; and that this operating authority is limited to such equipment, machinery, and materials, as are either commonly limited in their use to the oil-field industry or are clearly identifiable as being intended for use by the oil-field industry.
>
> "We further find that respondent is and has been engaged in the transportation of commodities other than those specified in the preceding paragraph; that such operation is and has been in violation of section 206(a) of the Interstate Commerce Act, is unlawful, and should be discontinued; that these unlawful operations were conducted wilfully; and that an order should be entered requiring respondent to cease and desist forthwith, and thereafter to refrain and abstain from such operations unless and until appropriate authority therefor has been obtained."

An order in accordance with these findings was entered by the Commission.

In its complaint Acton alleges that the order of the Commission is unreasonable, arbitrary, capricious, unlawful and an abuse of discretion as well as in excess of statutory authority. In substance Acton's basic claims are the following: the order of the Commission is predicated upon the Commission's substitution without justification of its ideas of grammatical construction for the well established and recognized rules of grammatical construction (otherwise stated, the substitution by the Commission of its conception of the meaning of simple, precise and intelligible language for the commonly accepted and recognized use and meaning thereof); the Commission's order does not include an adequate statement of findings; the Commission's findings are not supported by any evidence whatsoever.

The function of a three-judge district court in a suit to enjoin the enforcement of a Commission order is limited to ascertaining whether or not there is warrant in the law and the facts for what the Commission has done. Unless specific and prejudicial departure from the requirements of the law or abuse of discretion is shown, the reviewing court is without authority to intervene and substitute its judgment upon the issues committed to the determination of the Commission. *United States* v. *Pierce Auto Freight Lines*, 237 U.S. 515, l.c. 535-36, 66 S.Ct. 687, 90 L.Ed. 821; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, l.c. 138-40, 59 S.Ct. 754, 83 L.Ed. 1147; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, l.c. 286-87, 54 S.Ct. 692, 78 L.Ed. 1260; *I.C.C.* v. *Union Pac. R.R.*, 222 U.S. 541, l.c. 547-48, 32 S.Ct. 108, 56 L.Ed. 308. As stated in Mississippi Valley Barge Line, supra, 292 U.S. at 286-87, "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The major claim of error by Acton is that the Commission's finding is predicated upon a patently perverse misconstruction of the "simple, precise and intelligible" meaning of the language "*oil-field equipment, machinery, and materials.*"

To support its claim in this respect plaintiff Acton relies upon the testimony of two professors engaged in teaching English that in their opinion the adjective "Oil-field" in the language in question modifies, and therefore limits, only the noun "equipment" and in no wise modifies or limits the nouns "machinery" and "materials." The findings and order under review were contrary to that testimony. However these opinions were not binding on the Commission. *Ace Lines, Inc.* v. *United States* (S.D. Iowa) 197 F.Supp. 591, l.c. 596; see also *Loving* v. *United States* (W.D. Okla.) 32 F.Supp. 464, l.c. 467, *aff'd*, 310 U.S. 609, 60 S.Ct. 898, 84 L.Ed. 1387, and cases therein cited. Therefore, no relief can be granted Acton because of failure to follow the opinions of the two professors.

Plaintiff Acton further seeks to attach some critical significance to the lack of continuity in the underlining of that language of the certificate now in question. The broken underlining in question is contrasted by Acton with unbroken underlining as in the following hypothetical language: "*Oil-field equipment, machinery and supplies.*" Plaintiff concedes that in the foregoing hypothetical language "oil-field" modifies each of the following nouns.

The contention is that the broken underlining in the case at bar is not continuous and therefore "oil-field" modifies only the first noun, "equipment." Plaintiff cites *Pierce Auto Freight Lines, Inc.* v. *Converse*, 54 M.C.C. 447, l.c. 451, in support of this contention. The Court does not regard the lack of continuity in the underlining as demonstrative of the correctness of plaintiff's claim. Neither of plaintiff's expert witnesses regarded the lack of continuity as significant. (Diebolt, Tr. 115; Hilty, Tr.

76). No general inflexible rule of construction exists which would make the nature of the underlining determinative of this case, though of course it should be considered along with all other indicia of construction as it has been in this case.

The Commission has an expertise of its own in interpreting the language of certificates of convenience and necessity to determine the scope of the transportation operations authorized thereby. The "cumulative experience" of the Commission

> "begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *National Labor Relations Board* v. *Seven-Up Co.*, 344 U.S. 344, l.c. 349, 73 S.Ct. 287, 97 L.Ed. 377.

Since as written the language in question is patently ambiguous and susceptible of varying constructions, this Court should not substitute another construction for that of the Commission.

In the words of Mr. Justice Holmes in *Towne* v. *Eisner*, 245 U.S. 418, l.c. 425, 38 S.Ct. 158, 62 L.Ed. 372,

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Also applicable is the thought embodied in the language of Mr. Justice Frankfurter in *United States* v. *Rabinowitz*, 339 U.S. 56, l.c. 69-70, 70 S.Ct. 430, 94 L.Ed. 653 (dissenting opinion):

> "These words are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the

> history that gave rise to the words. * * * Words must be read with the gloss of the experience of those who framed them."

In the light of these principles, it cannot be said that the interpretation of the Commission, arrived at through the application of its "cumulative expertise," is not a permissible one.

The lack of logic inherent in the construction urged by Acton was aptly demonstrated by the following excerpt from page 6 of the Commission's report:

> "Thus, 'materials,' when translated into transportation parlance, is roughly tantamount to 'general commodities,' which description approximates the scope of Acton's admitted operations under its 'materials' authority. Accepting respondent's construction, one reaches a patently absurd result, i.e., that in the certificate in question the Commission authorized the transportation of:
>
> (1) materials, i.e., general commodities, apparently without the usual exceptions; plus
>
> (2) machinery of all kinds (a superfluous grant in view of (1) above); together with
>
> (3) oil-field equipment (likewise superfluous when combined with (1) and (2) above) . . ."

In accord with the conclusion in this case is *Pierce Auto Freight Lines, Inc.* v. *Converse*, 54 M.C.C. 447, *aff'd, Converse* v. *United States* (N.D. Cal.) 109 F.Supp. 807, wherein a similar question was decided contrary to the testimony of experts on language. As was noted in *Converse* v. *United States, supra*, if the plaintiff should prevail, then under the general class of machinery and materials (which in the unlimited sense covers nearly everything) plaintiff could usurp the right to transport practically all material things of every nature in the territory covered by its certificate to the impairment of every permit heretofore granted in said territory.

Further there has been no showing by the plaintiff that the original "grandfather" permit at the time of issuance was interpreted by the holder thereof to allow hauling of anything other than oil-field equipment, oil-field machinery and oil-field materials. There was no showing of any history of transportation of machinery and materials other than oil-field equipment, oil-field machinery and oil-field materials under the "grandfather" permit. If the history had clearly demonstrated that the "grandfather" permit covered machinery and materials generally, the decision might be different; however no such history appears in the record.

The primary responsibility for interpreting certificates and determining what items fall within a commodity description contained therein rests with the Commission. The Commission has exercised that responsibility, delineated the scope of Acton's operating authority, found that Acton had been and was willfully transporting commodities not authorized by its certificate, and issued its order to cease and desist.

We conclude that there was a rational factual and legal basis for the Commission's order; that the order is not clearly erroneous, not capricious, arbitrary or the result of any abuse of discretion on the part of the Commission; that there is a substantial basis for the order.

This memorandum opinion shall constitute the Court's findings of facts and conclusions of law.

APPENDIX B

Order

INTERSTATE COMMERCE COMMISSION

No. MC-C-2985

J. B. ACTON, INC.—INVESTIGATION AND REVOCATION OF CERTIFICATE

Decided April 3, 1962

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1. Respondent found engaged in certain transportation beyond the scope of operations authorized in its certificate, No. MC-80847 (Sub-No. 2).

2. Cease and desist order entered.

Eilis V. Gregory, Harry F. Horak, and Robert S. Turkington for the Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Thomas E. James, James F. Miller, Walter V. Huston, Tom B. Kretsinger, Ted V. McGuire, Hugh T. Matthews, and Donald E. Raymond for interveners in support of the proceeding.

James W. Wrape and Bill R. Davis for respondent.

REPORT OF THE COMMISSION

Division 1, Commissioners Walrath, Webb, and Tucker

WEBB, *Commissioner:*

Exceptions to the order recommended by the examiner were filed by respondent and by the Bureau of Inquiry and Compliance, Interstate Commerce Commission. The Bu-

reau and a number of interveners[1] replied to respondent's exceptions.

By order entered April 19, 1960, the Commission, division 1, on its own motion, instituted an investigation under sections 204(c) and 212(a) of the Interstate Commerce Act, to determine whether J. B. Acton, Inc., respondent, has been in violation of section 206(a) of the act by having engaged as a common carrier by motor vehicle, in interstate or foreign commerce, in the transportation for compensation of property not authorized by the certificate issued to it in No. MC-80847 (Sub-No. 2). In the event that willful violations are found, this order provides for the suspension of the aforementioned certificate for a stated period. Whether or not any such violations have been willful, the order further provides for the issuance of an order requiring respondent's compliance with the act, and upon respondent's failure to comply, authorizes suspension or revocation of the aforesaid certificate. Repliants appeared in support of the proceeding, as did a number of other carriers.[2]

The examiner recommended the entry of an order requiring respondent to cease and desist from operations found not to be authorized by its Sub-No. 2 certificate, the carrier's authority being limited to the transportation of commodities peculiar to or intended for use by the oilfield industry.

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[1] J. L. Cox & Sons, Inc., Parkhill Truck Company; J. O. (Red) Willett Pipe Line Stringing Corporation; Dunn Bros., Inc.; The Chief Freight Lines Company; Middlewest Freightways, Inc.; Knaus Truck Lines, Inc.; The Cassill Transfer and Storage Co.; Stasis Motor Freight, Inc.; Ship By Truck Co.; North American Van Lines, Inc.; East Texas Motor Freight Lines, Inc.; Gillette Motor Transport, Inc.; Voss Truck Lines, Inc.

[2] These were J. H. Rose Truck Line, Inc., Bell Transportation Company, Roberston Tank Lines, Inc., National Tank Truck Carriers, Inc., Mo-Ark Transporation Company, and Southern Plaza Express, Inc., motor common carriers.

On exceptions, the Bureau contends that the examiner erred (1) in failing to make specific findings to the effect that certain named commodities actually were transported by respondents, were not oilfield commodities, and thus were not authorized by respondent's Sub-No. 2 certificate which covers only "oil-field equipment, machinery, and materials"; and (2) in failing to recommend suspension of the aforesaid certificate for a stated period.

In its exceptions, respondent argues (1) that because the wording employed in its certificate is not patently ambiguous, the Commission may not look to the proceeding which gave rise to the questioned instrument; (2) that since the certificate contains no terms having a special meaning within the oilfield industry, the Commission, in construing the instrument, is bound by the plain meaning of the words contained therein, and may not now impose another interpretation based upon its unexpressed intentions at the time the document was drafted; (3) that the meaning of the certificate has been established through the uncontradicted testimony of respondent's two expert witnesses, whose interpretation offers the only grammatically correct reading of the instrument; (4) that the certificate authorizes the transportation of "materials and equipment" generally; (5) that the manner in which the commodity description in the certificate is underlined, and the history of the changes made in this underlining, reinforce respondent's position respecting the meaning of the terms themselves; (6) that the appendix to respondent's exceptions demonstrates the untenability of the position that the Commission always drafts certificates without repeating a limiting adjective whenever it seeks to limit the authority granted; (7) that respondent, acting in good faith, and relying upon the only grammatically correct interpretation of its certificate, has always held out openly to the public that it has authority to transport materials and machinery generally, and has published tariffs to that effect, without any objection by the Commission, and that the Commission may not now con-

demn such operations or characterize them as willful violations; and (8) that even if willful violations should be found, there is no legal foundation for the suspension sought by the Bureau, because no order has ever been entered directing cessation of the practices in question. Respondent urges that the proceeding be dismissed for the foregoing reasons and also because the Commission, acting in the dual capacity of prosecutor and judge, is likely to be biased. Acton suggests that a court action would afford a more impartial adjudication. Elsewhere in the same pleading Acton admits that the instant proceeding is lawful and merely requests an impartial decision. In view of the fact that this type of proceeding is authorized by sections 204(c) and 212(a) of the act, and its legality is conceded by respondent, the exception taken on this point is deemed to be without merit and will not be discussed further.

Repliants all contend, essentially, that respondent has been willfully operating beyond the scope of its authority, and that such practices should be stopped.

The evidence adduced, the examiner's recommendations, and the pleadings have been considered. The examiner's statement of facts is correct in all material respects, and, as herein supplemented, we adopt it as our own.

Respondent Acton holds a certificate of public convenience and necessity, issued in No. MC-80847 (Sub-No. 2), which, as pertinent, authorizes the transportation, over irregular routes, of—

Oil-field equipment, machinery, and materials,

> Between points in Kansas, Oklahoma, Texas, New Mexico, Arkansas, and Louisiana.

Under the construction advanced by Acton, the word "oil-field" modifies only "equipment," and not "machinery" or "materials." Relying upon this interpretation, it admittedly has for a number of years transported

a substantial quantity of varied traffic wholly unrelated to the oilfield industry.

In support of its position Acton introduced the testimony of two associate professors of English both of whom are learned in the field of grammar and composition. Although not familiar with the transportation industry, they based their interpretations of the commodity description upon the rule of grammatical construction which holds that an adjective modifying the first noun of a series does not modify the other nouns of the series. However, they conceded, in effect, that such a rule must give way where it is clear from the context of the writing that a different meaning was intended; and that in order to derive a meaning which is consistent with common sense, the reader's knowledge of the subject matter must be taken into account and weight necessarily accorded to such factors as trade usage and common understanding. Having no knowledge of the subject matter, however, they found no reason to depart from the aforementioned general rule. An appendix to respondent's exceptions lists many examples of certificates, issued by the Commission, in each of which a restrictive modifier was repeated throughout the commodity description.

The breadth of the asserted commodity description "materials" is suggested by the dictionary. The Merriam-Webster New Collegiate Dictionary, 1959 Edition, defines material(s) as:

1. The substance or substances, or the parts, goods, stock, or the like, of which anything is composed or may be made: as, raw materials * * * .

4. pl. The implements necessary to the doing of anything: as, writing materials * * * .

Thus, "materials," when translated into transportation parlance, is roughly tantamount to "general commodities," which description approximates the scope of Acton's ad-

mitted operations under its "materials" authority. Accepting respondent's construction, one reaches a patently absurd result, i.e., that in the certificate in question the Commission authorized the transportation of —

(1) materials, i.e., general commodities, apparently without the usual exceptions; plus

(2) machinery of all kinds (a superfluous grant in view of (1) above); together with

(3) oil-field equipment (likewise superfluous when combined with (1) and (2) above);

and that for some reasons which defies speculation, the Commission chose to hide the extraordinary grant of unrestricted general commodity authority in the phrase "oil-field equipment, machinery, and materials," a phrase strongly connoting a limited scope of operations. To the best of our knowledge, whenever we have authorized "general commodities" we have called it by that name. Conversely, a commodity description, "materials," without limitation to a particular class of materials, would be virtually unprecedented. We invariably include the description "materials" only in connection with a particular industry. When seeking to restrict "materials" authority, or any other authority, to the appropriate industry, we use a limiting adjective. Such a modifier is repeated throughout a series of nouns (as in the voluminous list of examples supplied by respondent) whenever it is felt at the time of drafting that such a technique is necessary or desirable in order to convey the thought intended, without ambiguity. However, where, as here, only one interpretation is consistent with common knowledge and common sense, we do not always offend the intelligence and patience of the reader by repeating the obviously intended limitation throughout. Of necessity, the language used in commodity descriptions is frequently cumbersome, and we naturally attempt to eliminate unnecessary verbiage in some of the more obvious situations. When this is done,

unfortunately, rare occasions do arise when ingenious carriers seize upon an inappropriate rule of grammatical construction, and thus armed, conduct flagrantly unlawful operations, relying upon an interpretation which defies the clear intent of the Commission and the common understanding of the industry. Such was the case in *Pierce Auto Freight Lines, Inc.*, v. *Converse*, 54 M.C.C. 447; in *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607, affirmed *sub nom., Dart* v. *United States*, 110 F. Supp. 876 (D. Minn. 1953), affirmed *per curiam*, 345 U.S. 980; and in *Builders Exp. Inc., Interpretation of Certificate*, 51 M.C.C. 103. In these cited cases, as in every other in which a certificate holder adopted its own fanciful interpretation in preference to the meaning readily apparent to others in the regulated motor carrier industry, the Commission repudiated the tortured constructions even (as in *Pierce Auto Freight Lines, Inc.*, v. *Converse, supra*) where language experts supported the offending carrier. The result can be no different here, even though respondent has found two learned college professors who agree with its position. While experts in their field, these witnesses were unfamiliar with regulated motor carriage and thus unaware of the absurdity, in transportation terms, of attempting to interpret the respondent's certificate solely from an academician's point of view.

In *Pierce Auto Freight Lines, Inc.*, v. *Converse, supra*, one of the respondent's witnesses suggested that the use of underlining indicated an intention to consider the words as a single group. The commodity description in that case—"*mining and construction materials, equipment and supplies*"— differs from that involved here in that the underlining (italics here) is complete. Respondent contends that since its certificate reads "*Oil-field equipment, machinery*, and *materials*," and not "*Oil-field equipment, machinery, and materials*," the Commission manifested a lack of intent to consider the words as a single group. We are satisfied that the underlining (italics here) has no interpretative significance here, and we think respondent's

citation of *Pierce Auto Freight Lines, Inc., v. Converse* in this connection misses the point of that case. One of the underlined groups of commodities considered in "*mining and construction materials, equipment and supplies,*" was construed, without regard to underscoring, and found to mean (1) mining and construction materials, (2) mining and construction equipment, and (3) mining and construction supplies. We conclude that respondent's certificate is unambiguous, and that the adjective "oil-field" modifies "materials" and "machinery" as well as "equipment."

There being no ambiguity in the considered wording, it is unnecessary to look to the records in the underlying proceedings to ascertain what authority the Commission intended to grant, but it is noteworthy that the respondent does not contend that the Commission's records would support a conclusion contrary to that reached herein.

As seen, respondent's certificate limits the carrier's operations to the transportation of oilfield equipment, oilfield machinery, and oilfield materials. Thus, Acton's commodity authority is confined to those items peculiar to or intended for use by the oilfield industry. In contrast to this comparatively narrow scope of operations actually authorized, Acton has admittedly engaged for a number of years as a carrier of what amounts to general commodities, its traffic having been restricted only by the limits of respondent's ability to attract business. There has been no justification for such conduct. The self-serving interpretation devised by respondent is too tortured for us to believe that these flagrantly unlawful operations were not willfully conducted. Furthermore, these violations were not made less serious by the fact that unauthorized traffic was solicited continuously, openly, and vigorously over a long period of time. It is well established that our failure to reject a tariff listing rates for unauthorized commodities operates neither to convey new authority nor to condone the unlawful conduct. *See Simpson—Investigation and Revocation*, 73 M.C.C. 75.

The effect of these willful violations has been to deprive duly authorized carriers of revenues to which they, and not respondent, were entitled. Such practices, of course, must be discontinued, and an order to this effect will be entered herein. To suspend respondent's certificate at this point would impost a hardship on those shippers which respondent is authorized to serve. However, continuance of the operations herein found unauthorized will be met with prompt action to suspend or revoke respondent's certificate.

We find that the certificate heretofore granted to respondent in No. MC-80847 (Sub-No. 2), for the transportation of "oilfield equipment, machinery, and materials," authorizes the transportation (1) of oilfield equipment, (2) of oilfield machinery, and (3) of oilfield materials; and that this operating authority is limited to such equipment, machinery, and materials, as are either commonly limited in their use to the oilfield industry or are clearly identifiable as being intended for use by the oilfield industry.

We further find that respondent is and has been engaged in the transportation of commodities other than those specified in the preceding paragraph; that such operation is and has been in violation of section 206(a) of the Interstate Commerce Act, is unlawful, and should be discontinued; that these unlawful operations were conducted willfully; and that an order should be entered requiring respondent to cease and desist forthwith, and thereafter to refrain and abstain from such operations unless and until appropriate authority therefor has been obtained.

An appropriate order will be entered.